The Origins and Evolution of Antidumping Regulation

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Antidumping is ordinary trade protection with a grand public relations program.
This paper - a product of the Trade Policy Division, Country Economics Department - is part of a larger effort in PRE to understand the economics of the emergence of "fairness" as a standard for regulating international trade, its implications for the continued openness of the international trading system, and its continued functioning as an important vehicle for development. This was funded by the research project on "Regulations Against Unfair Imports: Effects on Developing Countries" (RPO 675-52). Copies are available free from the World Bank, 1818 H Street NW, Washington DC 20433. Please contact Nellie Artis, room N10-013, extension 37947 (51 pages). October 1991.

From the beginning, antidumping has been part of the rhetoric and mechanics of ordinary protection. The protectionist action is in antidumping because it is broad and flexible enough to handle all the action.

The magic of antidumping is how it harnesses the righteousness of trust-busting to propel the bureaucracies of customs valuation to restrict imports. Antidumping began as an extension of antitrust regulation, but only when enforcement became an application of customs valuation procedures did it become an effective weapon against imports.

In both theory and practice, antitrust is an instrument to defend the public interest. But antidumping is different. Free of the constraints that rule of law impose on antitrust, antidumping is an instrument that one competitor can use against another - like advertising, product development, or price discounting. The only constraint is that the beneficiary interest must be a domestic one and the apparent victim a foreign one.

Antidumping is the fox put in charge of the henhouse: trade restrictions certified by GATT. The fox is clever enough not only to eat the hens, but also to convince the farmer that this is the way things ought to be. Antidumping is ordinary protection with a grand public relations program.

The history of antidumping (presented in this paper) suggests that we pay tribute to the durability of an idea. The notion that underlies contemporary antidumping - that protection should bring the price of imports up to a level that would cover production costs plus a reasonable allowance for profit - seems to be one for the ages. It inspired Canada's pioneering development of antidumping in 1904, the U.S. Congress's writing of the Smoot-Hawley Tariff in 1930, and it is today the potential foundation for Fortress Europe.
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Antidumping has about it the aura of a special measure to undo a special problem. Within this view, the explosion of antidumping actions in the 1980s was simply a good thing carried too far: the appropriate remedy to the current popularity of antidumping is to return it to its traditional and proper scope.

It is hard, however, to find the basis for this view in the history of antidumping regulation. There is little in that history to suggest that antidumping ever had a scope more particular than protecting home producers from import competition, and there is much to suggest that such protection was its intended scope. The thesis of the paper, then, is that antidumping has been from its beginning part of the rhetoric and part of the mechanics of ordinary protection. Antidumping is where the protectionist action is today because it has proved to be broad and flexible enough to handle all the action.

This paper has three sections. The first looks into the origins of antidumping regulation, the second examines contemporary antidumping regulation -- antidumping under the GATT -- and the third summarizes the import of the first two.

Section 1: The Origins of Antidumping Regulation

The overall theme of this section is that the ingenuity and the magic of antidumping is how it harnesses the righteousness of trust-busting to propel the bureaucracies of customs valuation in the service of restricting imports. Within this theme are two subthemes:

■ Early advocates of antidumping law and enforcement used the then-traditional arguments for relief from import competition. What was new was the means for restricting imports, not the reasons for it.

■ While antidumping was presented as an extension of antitrust regulation, as long as antidumping was constrained to the rule-of-law standards of antitrust enforcement, it could not satisfy the political demands that propelled its
creation: the politics of ordinary protection. Only when antidumping shifted to an administrative standard of interpretation and proof -- only when antidumping enforcement became an application of customs valuation procedures -- did it become an effective weapon against imports.

The political rhetoric of protection

"Dumping," under one name or another, has been part of the rhetoric of political economy for a long time. Jacob Viner (1923), the first scholar to pull together previous writing on the subject, notes a sixteenth century English writer who charged foreigners with selling paper at a loss to smother the infant paper industry in England. Viner also notes an instance in the seventeenth century in which the Dutch were accused of selling in the Baltic regions at ruinously low prices in order to drive out French merchants.

Alexander Hamilton, in his Report on Manufactures of 1791, used much the same argument. He complained vigorously that English manufacturers had banded together to crush their American competitors and prevent manufacturing from gaining a foothold in the United States (Viner 1923). But Hamilton was not arguing for action specifically against foreign dumping. He was arguing for a high and protective American tariff behind which the manufacturing industry could prosper in the new country. Viner explains as follows:

England was the first country to undergo the Industrial Revolution. It is therefore not surprising that the first extensive charges of dumping were directed against her manufacturers. It is by no means certain, however, either that actual British practice provided a substantial basis for the charges of dumping, or that fear of or resentment against British dumping, actual or prospective, was the real motive leading to the making of the charges. If foreign manufacturers can be plausibly charged with dumping, an effective argument is made available in
support of tariff protection to domestic industries endangered by such putatively unfair foreign competition. (36-7)

The first antidumping law: Canada, 1904

The Liberal party government in Canada was in a bind in 1904. Cursing the tariff was an important part of the party's politics of getting votes from farmers, while keeping it high was an important way of obtaining contributions from manufacturers to carry the party's campaign to the public. The Liberal party owed its majority to the support of Canada's farmers, and its failure to reduce the tariff as promised was threatening to cost it the farmers' support. Complaints about the high tariff were propelling a movement to break from the Liberal party and create an independent farmers' party (Viner 1923, 193).

At the same time, Canadian steelmakers were pressing for higher tariffs on steel rails. As Canada's western plains were opened up to immigrants, Canada's first transcontinental railroad, completed in 1885, was earning attractive profits, and railroad building in Canada began to surge. The U.S. Steel Corporation, recognizing an opportunity, set out aggressively to sell steel rails to Canadian railroaders. Canadian steelmakers alleged that U.S. Steel was unfairly aggressive and was dumping rails into the Canadian market (Easterbrook and Aitken 1988, 438ff and Seavy 1970, 70-71).

It would have been very difficult for the Canadian government to limit any tariff increase to steel rails. As in other countries, tariffmaking in Canada was not a discriminating process. Once the tariff was opened for revision, all the producers to which the government owed a political debt would come forward; the tariff increase would spread to other iron and steel products, to textiles, to farm equipment, and on and on.

The Hon. W.S. Fielding, Canadian minister of finance, in presenting his proposed approach in June 1904, explained the situation as follows:

We find today that the high tariff countries have adopted that method of trade which has now come to be known as slaughtering, or
perhaps the word more frequently used is dumping; that is to say, that the trust or combine, having obtained command and control of its own market and finding that it will have a surplus of goods, sets out to obtain command of a neighboring market, and for the purpose of obtaining control of a neighboring market will put aside all reasonable considerations with regard to the cost or fair price of the goods; the only principle recognized is that the goods must be sold and the market obtained....

This dumping then, is an evil and we propose to deal with it. (quoted in U.S. Tariff Commission 1919, 22)

Mr. Fielding's argument was not novel. Such alleged evil by foreigners had for several centuries been one of the familiar arguments for a higher tariff to restrict imports. Dumping, real or imagined, had for centuries been a target of opportunity for interests seeking protection. What was different this time was what Mr. Fielding proposed to do about it: this was the first time that antidumping became the instrument of opportunity.

The substance of the proposed antidumping regulation is in its first paragraph:

Whenever it appears to the satisfaction of the minister of customs, or of any officer of customs authorized to collect customs duties, that the export price or the actual selling price to the importer in Canada of any imported dutiable article, of a class or kind made or produced in Canada, is less than the fair market value thereof, as determined according to the basis of value for duty provided in the Customs Act in respect of imported goods subject to an ad valorem duty, such articles shall, in addition to the duty otherwise established, be subject to a special duty of customs equal to the difference between such fair market value and such selling price. (quoted in U.S. Tariff Commission 1919, 21)
The law was amended in 1907 to extend its scope to all imported articles, not just dutiable articles.

The invention of antidumping was not as great a departure from standard practice as may appear at first glance: Canada had a long history of clever changes of customs valuation procedures to achieve increased protection. McDiarmid (1946), in his history of Canadian commercial policy, concludes that "Canada's principal contribution to the technique of trade restrictions has been in giving the executive and administrative branches of government a wide measure of control over the effective rate of duties through artificial valuation of goods for duty purposes" (8-9).

This first antidumping law, like many inventions, was the child of necessity. But not of the necessity of keeping "unfair" imports under control: the tariff had done that for centuries. Canada's new law was sired by the necessity, brought on by the politics of the day, for the Canadian government to retain some selectivity over the provision of protection.

The law satisfied this need perhaps more in appearance than in substance. Previous use of administrative changes to provide protection had educated the public, so that in the 1905-06 tariff hearings Canadian farmers groups opposed the antidumping law, arguing that it had led to increases in the cost of lumber, stoves, hardware, and agricultural implements needed by the western immigrant farmers (U.S. Tariff Commission 1919, 24). Soon thereafter the farmers bolted the Liberal party and organized their own agrarian reform party.

Manufacturers seem likewise to have seen through appearances. Viner (1923, 203) reports that the Canadian Manufacturers Association at first opposed the antidumping law: making dumping illegal would vitiate one of their more effective arguments for a higher tariff. But as soon as the law was passed, U.S. Steel raised its prices in Canada by the amount the law required, and this example of the law's potential seems not to have escaped the attention of other manufacturers. At the same tariff hearings at which the farmers opposed the antidumping law, Canadian manufacturers supported it: "We
heartily approve the principle embodied in the tariff legislation of 1904, but we are of the opinion that steps should be taken by the government to give more practical effect to the legislation" (quoted in U.S. Tariff Commission 1919, 25). They went on to offer suggestions for making enforcement more effective.

In the end then, the Liberal party strategy of introducing antidumping actions rather than raising the tariff seems not to have succeeded in limiting import protection. Why, in retrospect, did Liberal party leadership think that it might?

Part of the answer is the familiar semantic deception: a tariff is protection, antidumping is something else. (But neither the farmers nor the manufacturers were deceived.) Another part is that the government seemed not to realize how broad an authority it had created. In any country with a tariff, the home market price would be the tariff-inclusive price, while the export price would be the lower, tariff-exclusive price. Since most countries in those days had a high tariff, the antidumping law provided in law a justification to act against almost every import shipment. Though the law's technicalities left the government with the discretion not to act even when the justifying condition was met, the same "me too" politics that made tariff reform impossible to control soon extended antidumping protection to all the products on which farmers had complained that the tariff was already too high.

Other early laws

New Zealand, 1905

In 1905, the New Zealand government found itself in a bind similar to the one the Canadian government had been in a year earlier. The response was similar as well: the New Zealand antidumping law of 1905. New Zealand and UK manufacturers of farm implements complained that a U.S. trust was attempting to monopolize the New Zealand market by price cutting. At the same time, New
Zealand farmers insisted that farm implements remain duty free, and they were vigilant in opposing other government actions that would increase their costs. The government was looking for a way to balance on the edge between offending equipment manufacturers by not protecting them and offending farmers by pushing up the cost of equipment.

The New Zealand law established a commission to investigate complaints of unfair competition. Based on the commission's findings and recommendations, customs officials were empowered to provide subsidies to New Zealand and British manufacturers to match the "unfair" exporter's price cuts. Or, if New Zealand and British exporters agreed to cut their prices at least 20 percent, a countervailing duty could be imposed on unfairly sold exports. Viner (1923) notes that preferential treatment of Great Britain "was not extended to Canada, whose manufacturers of agricultural implements were the principal competitors of the American trust in the trade with New Zealand" (207). Viner also notes that the New Zealand government never imposed a countervailing duty nor granted a subsidy under this law. The support these measures would earn from farm equipment manufacturers never seemed worth the risk of offending farmers or taxpayers.

**Australia, 1906**

While the Canadian and New Zealand antidumping laws were generic responses to specific problems (steel rails in Canada, farm equipment in New Zealand), the 1906 Australian regulation was a generic response to a generic problem. Antidumping regulations were a section of law aimed at the general problem of controlling monopoly. The law was never applied, however -- in Viner's (1923, 206) judgment because it was too complicated.

Within a few years of the passage of antidumping laws in Canada, Australia, and New Zealand, antidumping laws were also passed in South Africa and Newfoundland. After that, no new antidumping law was passed until 1921, when Great Britain passed its first, the United States, Australia, and New Zealand passed new ones, and Canada added a major revision to its law.
Great Britain, 1921

The British government in 1921 passed an antidumping law that was even more complicated than the unworkable Australian regulation of 1906. Action against imports would come only after nine steps had been taken. For a sense of the law's complexity, consider that the fifth of these steps was an investigation by the board of trade and that after that came submission by the board of a draft order to the House of Commons and then passage of a resolution by the House of Commons. Beyond these nine steps, there were provisions for appointment by the Lord Chancellor of a "referee" to handle disputes with importers over the facts of the case, and still other provisions for the commissioners of customs and excise to handle appeals by importers for remission or refund. The law seemed intentionally too complicated to work. In Viner's (1923) opinion, "it is abundantly clear that there was no enthusiasm on the part of the government for this ... Act, that it was intentionally made restricted in its scope, and that its main object was to achieve a formal redemption of election pledges" (225).

What was going on? An intense anti-German sentiment was widespread in the years just after World War I, and the problem of "below cost" imports was one of the particulars. Viner quotes a propagandist who insisted, as World War I neared its end, that "the German government was accumulating vast stocks of goods in order to dump them on the markets of the world ... and regain in the field of economic warfare what she was losing on the military battlefield" (65). What better response to a problem that did not exist than a law that would not work?

The United States also passed an antidumping law in 1921. But before moving on to the evolution of the U.S. law, it is useful to look into the matter of why there was a surge of antidumping regulation in 1921.
Why the outburst of antidumping laws in 1921?

The United States and the United Kingdom were not the only countries that passed antidumping laws in 1921. In that year, Australia, New Zealand, and Canada also passed new antidumping laws or significant amendments to old ones. Dumping was not a new issue, however, so the explanation of why the time was ripe for passage of antidumping laws lies in several other factors.

- **Hostility toward Germany.** Hostility toward Germany, combined with the popular conviction that German enterprises were particularly vicious perpetrators of predatory dumping, was certainly a factor.

- **The end of selective tariff revision.** The politics of tariffmaking no longer allowed tariff revision to be limited to specific products. Once the tariff was opened for revision, a government could not resist what Frank Taussig described as "the procession of persons who appear before tariff committees and plead for ... higher duties" (Taussig and White 1931, 196).

This consideration was evident in the politics behind passage of the Canadian and U.S. laws. It was carried to the extreme by the British government, which wrote an antidumping law to avoid revising the British tariff -- and intentionally made it so complicated that it would generate no antidumping action either! But, as noted, the scam of writing an antidumping law to escape being forced to restrict imports did not work in Canada in 1904.

- **The halo-effect of trust-busting.** Another factor was that trust-busting was in the political air at the end of the nineteenth century and the beginning of the twentieth. This provided a step up for any law that proposed to do something about the evil trusts. The emotion of trust-busting could be even more intense when directed at a foreign trust.

Though emotion did lead to overstatement, the concern to regulate the evils of predatory trusts was not a trivial one. Anyone who is skeptical that trusts were predatory should read Daniel Yergen's (1991) description of how Standard Oil was put together. And anyone who is skeptical of the benefits of government action against trusts should read Yergen's description of how
productivity and innovation jumped when Standard Oil was divided into six separate companies.'

Price undercutting, employed just often enough to make its threat credible, was a tool used by captains of industry to build and expand trusts. Driving the independent enterprise out of business was not, however, the trust’s usual objective. Too much money would be lost and too many assets run down by price cutting sufficiently severe and of sufficient duration to do that. A quick merger, profitable to both companies, would be better. John S. McGee (1958) explains the logic of this approach and documents that it was the way things usually went. Officers of the independent usually became officers of the trust. Yergen (1991, chapter 2) gives examples.

High tariffs everywhere. Every country in those days except Great Britain had a high tariff, so every exporter except those of Great Britain sold from behind a high tariff wall and over a likewise high tariff into the foreign market. To be competitive, the price the exporter set had to be less than the home-market price by the amount of the tariff. This created the appearance that exporters were always willing to undersell home producers and hence that the tariff was necessary -- otherwise local manufacturers would be undersold and driven out of business.

Industries pressing hard for import protection and governments so pressed perhaps found it easy not to see that the economics behind the pricing of predatory trusts was completely different from the economics behind the apparently similar pricing by exporters. As Frank Taussig has said, "Competition of any sort is unwelcome enough; competition from foreigners seems always to be regarded with particular dread" (Taussig and White 1931, 196). Within the politics of the matter, the tariff created the need for even more protection from foreign enterprises.

A new way to do it. Canada had invented a new way to do it in 1904. The mechanics of enforcement under the Canadian law were seductively straightforward and familiar. Other high-tariff countries used valuation procedures similar to Canada’s, and many of Canada’s innovations in the use of
such procedures as an instrument of commercial policy were soon copied by other countries. And where there is a way, there will soon be a political will.

The influence of trusts. Finally, the trusts themselves may have had some influence over how they were regulated. They themselves would surely prefer antidumping regulation relative to the alternatives of breaking them up or removing their import protection.

The evolution of the U.S. antidumping law of 1921

In the early twentieth century the tariff was, for most countries, the major instrument for regulating imports. And in the United States, as in other countries, the evils of foreign trusts first came into trade politics as an argument for higher tariffs. But antidumping has a different history in the United States than in Canada. In Canada, policing the evils of monopoly power (trusts) was never more than the rhetoric of the matter. In the United States at the early stages of antidumping regulation, there was a better match between the rhetoric and the mechanics of the matter -- early U.S. antidumping regulations were, in substance, extensions of antitrust law. But these laws did not provide what the motivating politics demanded -- restrictions of imports -- and there was continuing pressure for change. The various steps in the evolution of the U.S. antidumping law provide a graphic illustration of how different antidumping regulation is from antitrust law -- once it has become a useful instrument for regulating imports.

Even so, the shift from antitrust to anti-imports is often viewed as a change in the mechanics of regulation, with little attention to how the shift of mechanics would change the nature of what was being enforced -- of just what it was that the method singled out for punishment. The analysis presented here will suggest that that view is incorrect.
The Sherman Antitrust Act of 1890

The Sherman Antitrust Act of 1890 prohibits, under severe penalties, every contract or combination in restraint of interstate or foreign commerce, and every monopolization or attempt to monopolize such commerce. But application of the act to sales of imports was severely limited by a Supreme Court decision that refused to apply it to any sales contract that had been made in the exporting country rather than in the United States.

Section 73, Wilson Tariff Act of 1894

The U.S. Congress, in section 73 of the tariff act of 1894, attempted to extend the scope of the Sherman act to imports by making unlawful every conspiracy or combination that was (1) engaged in importing and (2) intended to restrain trade or to increase the U.S. price of an imported article. Through the time of Viner's writing (1923), the law had been invoked only once, against an association of U.S. bankers and importers plus the Brazilian state of Sao Paulo, to limit Brazilian exports and thereby rig the price of coffee on the U.S. market.

Antidumping law of 1916

During World War I, the rise of anti-German sentiment and the widespread popular conviction that German enterprises were particularly vicious perpetrators of predatory dumping led to considerable pressure for an upward revision of the tariff. But the U.S. administration of President Woodrow Wilson, like the Canadian Government in 1904, would not risk opening the tariff for revision and instead followed the Canadian example in proposing legislation aimed specifically at foreign dumping. In line with the Wilson administration's recommendations, the U.S. Congress, in sections 800-801 of the revenue act of 1916, made it illegal to import goods at a price substantially below the "actual market value" in the producing country or in countries to which they were commonly exported providing there was an intent
to injure, destroy, or prevent the establishment of an industry in the United States or to restrain competition.

This law is still on the books, but John J. Barcelo (1991), in his review of antidumping laws and actions, found that despite the attractive lure of triple damages, only one serious private suit was brought under the law -- a 1970 suit by Zenith Radio Corporation against Matsushita Electrical Industry Company. The suit was dismissed on summary judgment when Zenith did not provide facts to support a plausible theory of predatory dumping.

The U.S. Tariff Commission study of 1919

In 1916, the U.S. Tariff Commission, at its own initiative, began investigations of foreign competition in the U.S. market and of Canada's experiences with its antidumping law. The key questions in its investigation of foreign competition sought "personal knowledge of unfair competition through the selling in the United States of articles of foreign origin at less than the fair market value when sold for home consumption in the country of origin" (U.S. Tariff Commission 1919, 12). The commission contacted 562 U.S. business enterprises directly. In addition, thirteen producers or traders associations circulated the commission's questions to their membership. Thus every enterprise in the United States against which imports provided some degree of competition was informed of the investigation and had the opportunity to respond. (The responses are tabulated in table 2.1.)

The commission's survey of virtually every business enterprise in the United States found twenty-three that claimed knowledge of foreign dumping. Almost six times as many reported that they had no knowledge of unfair foreign competition or dumping. Of the complaints of foreign competition, the commission classified by far the largest share as "severe competition." A few examples demonstrate the tenor of these complaints:

Patent leather. After the enactment of the last tariff bill, Germany began to ship in grain-finished patent leathers made from cowhides and kid skins and these leathers were sold at a lower
cost than we could produce the same article in our country, although we were the originators of grain-finished patent leathers.

Labels. This year a certain Pacific coast lithographer quoted $1.10 per thousand on several million sardine labels. The Japanese price for the same goods was 51 cents per thousand, delivered in California.

Horseshoe nails [from Sweden]. These horseshoe nails were sold at ridiculously low prices, far below the cost of manufacture in the United States. (U.S. Tariff Commission 1919, 15, 16)

Several of the complaints the Commission classified under the heading "dumping" had a similar tone. Consider the following examples:

Hosiery. The worst thing we see in the way of unfair foreign competition is the importation of Japanese hosiery at very much less than their value. In fact, these goods are sold at a price less than the yarn is worth in them.

Japanese army equipment leather. Our representative in the East reports the sale of Japanese leather at prices that barely cover the cost of the green hide, to say nothing of the cost of manufacture. (13, 14)

These statements are similar to those that Schattschneider (1935), in his study of the U.S. politics of protection in the 1920s and 1930s, quotes from statements made before tariff committees to justify a higher tariff rate. They are all based on the principle of protection that dominated the tariff politics of the day. Taussig (1931) points out that the cost-equalization formula was already explicit in the Republican party platform of 1904 and 1908. The 1908 platform stated that "in any protective legislation the true principle of protection is best maintained by the imposition of such duties as will equal the difference between the cost of production at home and abroad, together with a reasonable profit to American industries" (quoted in Taussig,
363). Schattschneider (1935, 8) reports that in 1928, the cost-equalization formula was the principle of protection of both major parties. We thus see that advocates of antidumping regulation presented no unique reasons for this unique form of import protection. As in Canada in 1904, the voice that called for antidumping action was the voice of ordinary protection.

**Antidumping law of 1921**

Where there is a way, however, there is a will. The 1916 antidumping act did little to diminish pressure for a Canadian-style antidumping law, and proposals to the effect were soon introduced before the Congress. And although most of the complaints about foreign competition brought forward by the 1919 Tariff Commission study were not complaints about foreigners selling at a lower price in the United States than in their home markets, the commission nonetheless went on to recommend Canadian-style antidumping legislation.

Congress passed such an antidumping law in 1921, and the present U.S. antidumping law traces back to that law. The law empowered the secretary of the treasury (whose department included the customs service) to impose a special dumping duty when he determines that a U.S. industry is being or is likely to be injured or prevented from being established by imports of a product at a price below its fair value in the exporting country or in other export markets. Congress has since reassigned the determination of injury to the U.S. International Trade Commission (originally the U.S. Tariff Commission) and has pressed the president to assign the determination of dumping to the U.S. Department of Commerce. Though numerous amendments have expanded its technicalities, the form of the law has remained basically unchanged.
The rhetoric versus the regulation: from antitrust to anti-imports

Before looking into the detail of what changed in antidumping regulation in the United States, it is useful to recall the passage of the Canadian law of 1904 -- the pattern for the U.S. law of 1921. The Canadian experience shows the sharp contrast between the rhetoric of the matter and the facts of the regulation that was passed. Let us look back at the statement with which Finance Minister Fielding introduced the first antidumping law:

The trust or combine, having obtained command and control of its own market and finding that it will have a surplus of goods, sets out to obtain command of a neighboring market, and for the purpose of obtaining control of a neighboring market will put aside all reasonable considerations with regard to the cost or fair price of the goods; the only principle recognized is that the goods must be sold and the market obtained. (quoted in U.S. Tariff Commission 1919, 22)

The law Canada adopted states that:
Whenever it appears to the satisfaction of the minister of customs ... that ... the actual selling price to the importer in Canada ... is less than the fair market value ... such article shall ... be subject to a special duty of customs equal to the difference between such fair market value and such selling price. (quoted in U.S. Tariff Commission 1919, 21)

A wide gap separates rhetoric and regulation. In the leap from rhetoric to regulation, both what the government must prove before imports may be restricted and how rigorously the government must prove it changed. Trust-busting remains the rallying cry of the mob, but the object shifts from trusts to imports, the instrument from law to bureaucracy.

Canada cleared the gap from rhetoric to regulation in a single bound. It took the United States four tries, so the U.S. experience provides a more
detailed experiment from which to determine what was the critical change.\(^8\) The more evident changes are in the criteria that determine when the government will act on a competitor's request for restraint of another. But, I will argue, the more significant changes, the ones most critical to the transformation of antidumping into ordinary protection, are the changes in the standard of proof that must be met before the government will act.

**Criteria: what the offense is**

Look back again at Mr. Fielding's statement of the problem and compare it with the regulation passed by the Canadian Parliament. The change from what the rhetoric condemns to what the regulation bars is enormous. The error in logic is as glaring as to presume that from the statement "Every tiger has a tail" (a predatory trust will undercut prices) it follows that "Everything with a tail is a tiger" (every enterprise that sets a lower price abroad than at home is a predatory trust). This change is perhaps easier to discern in the step-by-step changes made in U.S. law (outlined in table 2.2.) than in the Canadian case.

The Sherman act and the tariff act of 1894 attempted to apply antitrust concepts to the regulation of imports. When these laws proved unsuccessful in finding and punishing foreign unfairness, the antidumping act of 1916 introduced major changes. For one, it eliminated the need to identify a conspiracy or combination of sellers organized to commit some act toward some end. The offense under the 1916 act is simply to sell imports below the actual market value of the goods. And although the 1916 act retains the language that this pricing is illegal if it has the intent to restrain competition, the act added a second and easier condition -- the intent to injure a U.S. industry.\(^9\) So far as criteria are concerned, the 1916 act dropped the "injury to competition" standard of the antitrust laws and replaced it with a "diversion of business" standard -- the sort of diversion that is a more or less normal part of the competitive process. A trade restriction remedy is provided against pricing to win customers if the pricing is by a foreign enterprise and
the customers are domestic ones. In other words, government protection would no longer be limited to local citizens beset by a foreign tiger. Henceforth, any local bothered by anything foreign with a tail could call on the government wardens for help.

The 1921 act made little change in the criteria that would justify government action. The words "intent to" were dropped from the injury test, but as I explain below, this change had little significance. By changing the standard of proof that had to be achieved before the government would act, however, the 1921 act created the potential for antidumping to become a generally applicable instrument for regulating imports.

**Standards of proof**

The criteria for identifying an offense are much the same under the 1916 and 1921 acts. On the matter of pricing they are identical: pricing in the United States at less than the normal or fair value of the product at home. On injury, they are very close. The 1916 language is: "Provided that such act or acts [the pricing] be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States." The 1921 language is: "Whenever the Secretary of the Treasury finds that an industry in the United States is being or is likely to be injured or is prevented from being established."

Yet the 1916 law did not catch enough foreign tigers marauding in the U.S. business jungle to satisfy the politics of the day -- or even enough foreign pussycats or other tailed animals. Was that because there were no such tigers or pussycats hunting in the U.S. business jungle or was it because the law was inadequate to trap them?

Proponents of antidumping action against imports argue that unwise technicalities of the acts of 1916 and earlier prevented prosecution of predatory foreign trusts. They point particularly to the difficulty of proving intent, arguing implicitly that if the "effect" concept had been used the law would have worked. Others, such as Barcelo (1991), argue that the lack of
action against foreign predation under the 1916 and previous laws is a sound indicator that there was no such predation -- at least, that there was much less of it than the political rhetoric insisted. The 1916 antidumping act was, after all, the third attempt to legislate the basis for such prosecution -- not counting proposals introduced but not passed into law. Technical glitches would have been worked out by then.

The limited scope of the 1916 law stemmed from its being a legal remedy, a part of criminal law and therefore subject to the strict rules of meaning and proof that apply to the law. The courts took antitrust law to be the relevant legal context for giving meaning to the terms in the law, and in this context the 1916 act was interpreted to demand the "injury to competition" standard.

There are several bases for arguing that the change of criterion made by the 1921 act -- dropping the word "intent" in the injury requirement -- was not a significant change. Like the 1921 antidumping act, section 316 of the tariff act of 1922 did not qualify its injury clause with the word "intent." The difference between the two was that enforcement of section 316 would be in the strict legal tradition of the antitrust laws. Viner (1923, 250), citing this aspect of section 316, concluded that it would not be effective.10

A second point comes from the thought experiment of inserting the word "intent" into the injury clause of the 1921 antidumping act. It seems unlikely that the additional word would change the way the clause is interpreted today. Anyone who offers goods for sale does so with the intent of winning the sale from someone else. So, in an administrative context, free from the precedents of the legal system, it is unlikely that the word "intent" would have limited the circumstances under which injury would be found.

Dissatisfaction with the 1916 act was political, not legal dissatisfaction, and in politics, this dissatisfaction was relative to what a Canada-style administrative remedy would provide. Rule of law was what was blocking things, not any particular word in the law. Enlarging the scope for action against imports would require a shift from a legal to an administrative
approach -- or, if one wants to use the pejorative synonym, a bureaucratic approach.

Canada's method built on administrative procedures for customs valuation. In those days of high tariffs that provided an incentive for importers to understate the value of goods, tariffs were charged on "fair market value" or the invoice value, whichever was higher. Governments had specialized staffs and routine procedures to determine the fair market value of goods. Enforcement, as Finance Minister Fielding explained, was simplicity itself:

The Customs Department requires the importer to show on his invoices two columns; that is to say, the price in the market for home consumption ... and the price at which these goods have been purchased [in Canada]. Therefore, if that statement is honestly made the evidence is before the Customs Department; if that is not honestly made, then there is a fraud. (U.S. Tariff Commission 1919, 24)

There is a "Got ya!" tone to this. The tariff is charged on the invoice value or the home-market price, whichever is higher. If the home-market value is higher than the invoice value, there is an additional dumping duty equal to the difference. And if the stated home-market value is less than Canadian customs' estimate of that value, the importer is also in trouble for customs fraud.

The Australian antidumping law made it explicit that a legal standard was being abandoned for an administrative one. When it called for matters to be referred to the High Court, Australia's 1906 law stated that the court proceedings were to be informal and not subject to the rules of general jurisprudence or of evidence (Viner 1923, 209). The United States and Canada made the same change by building antidumping regulation out of pieces -- administrative functions -- not subject to such standards.

Andreas F. Lowenthal (1980), after comparing the standards of proof required for relief under the "fair" and "unfair" sections of U.S. trade law,
concludes that there may be "a difference in the burdens of proof placed on the parties, although my impression is that burden of proof in the sense that lawyers are familiar with the term, in, say, determining the issue of contributory negligence in an automobile accident, simply does not exist in determinations of the kind we are talking about" (217-18).

Perhaps the most straightforward expression of this soft standard of proof is the "facts available" or "best information available" clause, which is a part of every country's antidumping regulations. In the GATT antidumping code, it reads as follows:

In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, [decisions], affirmative or negative, may be made on the basis of the facts available. (article VI, paragraph 8)

The import of this clause is that the threshold level of information necessary to open an investigation is sufficient to complete one. While threshold information must be verified by the investigating agency, it will be information provided by the party seeking import relief. 11

The shift from a legal to an administrative standard of proof and evidence not only broadened the scope of action against imports, it also made the criteria for such action much more malleable. Under the softer standard of interpretation and proof, administration of the law could follow changing political pressures for protection much more quickly than a more rigorous, rule-of-law standard would allow. Thus it prepared the way for the eventual emergence of antidumping as the main vehicle for import-competing interests to press for protection -- and for governments to respond to those pressures. Examples of how this was done are presented in section 2 of this paper.
Early use of antidumping

The passage of antidumping laws did not mean that antidumping immediately became a major instrument of import regulation. In the United States, the tariff remained the dominant instrument. The year after passing the 1921 antidumping bill, the U.S. Congress passed an extensive upward revision of tariff rates, the Fordney-McCumber Tariff. The U.S. tariff had been revised downward during the 1913-21 administration of President Woodrow Wilson, but the Fordney-McCumber Tariff pushed U.S. rates back up to or above the rates that had been in force at the end of the nineteenth century.

But in Australia, South Africa, and Canada, antidumping actions soon became a prominent part of trade controls (Barcelo 1991). McDiarmid (1946), writing about Canada, concludes that "especially from 1930 to 1935, the effective level of tariff was perhaps as much subject to executive and administrative as to legislative control despite the significant treaty and autonomous legislative changes of the period. Tariff-making by administration was perhaps carried farther in Canada at this time than in any other country" (306).

Rulings on tariff classification and the exercise of powers given under the antidumping clause were the administrative actions that became a major mechanism of import policy. Under legislation then in force, the fair market value of an imported good was both the basis for assessing the tariff charge and the benchmark from which administrators subtracted the selling price on exports to Canada in order to arrive at the dumping margin. This double use of fair market value gave a double impact to any increase that administrators could engineer: it increased the importer's tariff liability by the ad valorem rate of the tariff and it increased the special dumping duty. This special dumping duty was, in effect, a tax on imports assessed at 100 percent of the dumping margin.

Amendments to the Canadian antidumping clause adopted in 1921 and 1930 provided the flexibility of interpretation that Canadian administrators...
exploited. The amendments provided that "fair market value" would be in no case "less than the actual cost of production of similar goods ... plus a reasonable advance for selling cost and profit" (quoted in McDiarmid 1946, 308). The minister of customs was able to find many degrees of freedom in both "actual cost" and "reasonable profit" -- sufficient to bring McDiarmid to conclude that "the implication of this new conception of the potentialities of dumping duties is clear. The power of the executive to fix prices at which imports could be sold in Canada was practically unlimited.... The decision of the minister of customs and his civil service advisers became the final arbiter of 'fair market value'" (310-11).

A summing up

The arguments made in this section can be summed up in three points

- Antidumping has long been part of the rhetoric of protection.
- Manipulation of customs valuation has long been part of the arsenal of anti-import weapons.
- Antidumping is, in substance, another clever way to use customs valuation procedures as a weapon against imports.
  - Antidumping preserves all the old tricks against reform of customs valuation, reforms that now constrain value for assessment of ad valorem customs duties to transactions value.
  - Antidumping makes these tricks even more powerful. As increases of the "dumping margin" they are fully added (100 percent rate) to import charges; as increases of the "customs value" they would be added at the ad valorem tariff rate, which even in high-tariff countries is seldom as high as 100 percent.
Section 2: Contemporary Antidumping

This section continues the history of antidumping regulation through its inclusion in the GATT and its evolution since. The expansion of antidumping until it became the major means for controlling imports in four major trading entities -- Australia, Canada, the European Community, and the United States -- illustrates the inherent flexibility of antidumping as a weapon against imports. This section looks at how that expansion came about and at the nature of the regulatory mechanism that antidumping has become. It argues that the circumstances that contemporary antidumping regulations include under the label "dumping" are broad enough to encompass every instance in which domestic output is displaced by import competition -- in the language of the regulation itself, any instance of "injury from imports."

Recalling the aura that antidumping has as a special measure to remedy a special problem, we come to the secondary theme of the section. The more recent history of antidumping suggests that this presumption is not only incorrect, it is misleading: it is a major reason why antidumping has escaped the discipline the GATT system has brought to other trade restrictions.

Antidumping and the GATT

Much of the history of the GATT negotiations is in fact the history of negotiating a charter for an international trade organization. The GATT began as a provisional agreement to implement the first set of tariff reductions. The expectation at the time was that the international trade organization would eventually be the institutional framework for coordinating national trade policies, just as the International Monetary Fund is for monetary policies. When the international community could not agree to establish the international trade organization, the GATT became, by default, the framework for international coordination of trade policies.

The United States provided the basic working document for the international trade organization negotiations, and this suggested charter
contained most of the provisions on antidumping that are now in GATT article VI. The accepted reading of the negotiating history is that no country delegation to the international trade organization or the GATT negotiations strongly insisted on including a provision for antidumping (see, for example, Barcelo 1991 and Jackson 1969). And though there was concern that antidumping laws might compromise the objectives of the agreement if overused, the drafting committees concluded without controversy that antidumping and countervailing duty provisions were needed.

Through GATT's first two decades, antidumping was a major instrument of policy only in Australia, Canada, and South Africa. On the international scene, it was a minor issue. In 1954 Italy brought to the GATT a complaint about Sweden's antidumping procedures, but Sweden changed them and the issue was resolved without a formal decision. And though the GATT came into force in 1948, the contracting parties (as GATT member countries are called) did not canvass themselves about the use of antidumping until 1958. The resulting tally showed a total of thirty-seven antidumping decrees in force across all GATT member countries as of May 1958 -- twenty-two of them in South Africa (GATT 1958, 14). The GATT report notes, however, that "this table does not contain figures for Canada and New Zealand, since in those countries the customs authorities can take action without decree and therefore an enumeration comparable with that given by the other countries is impossible" (14).

Antidumping first became a significant GATT issue at the Kennedy Round of 1964-67, perhaps more by dint of diplomatic manipulation than by clear intent. As Kenneth Dam (1970) explains, "The United States, having introduced the subject of nontariff barriers into the negotiations, was chagrined to find that the nontariff barriers most often singled out by other countries for priority of action were those maintained by the United States, of which one of the most often mentioned was the U.S. antidumping statute" (174). The attack on U.S. antidumping was clearly a strategy of offense being the best defense of the European nontariff barriers that the United States had wanted brought
to the negotiating table. From passage of the U.S. antidumping law in 1921 through December 31, 1967, the U.S. government had conducted a total of 706 antidumping investigations -- all but 75 of them had ended with a negative determination (Seavey 1970, 65).

In those years, the function of U.S. antidumping and "escape clause" procedures was much more to preserve the openness of the U.S. market than to restrict foreign access. Particular pressures for protection that in Smoot-Hawley days would have brought the Congress to enact higher tariff rates could be diverted into antidumping or escape-clause investigations. As long as the U.S. government could dismiss nine out of ten petitions as unworthy, the pressures did not block U.S. participation in the almost continuous rounds of GATT tariff negotiations, and the few restrictions added by these "trade remedies" were more than offset by reductions agreed at the rounds. (How this process worked is explained more fully in Finger 1991.)

Nevertheless, the U.S. delegation to the Kennedy Round adopted a strategy of accommodation rather than of explanation or defense. Though the antidumping code that was negotiated would have, according to Dam (1970), "tied the hands of the United States on a number of procedural matters" (174), the U.S. administration defended it against criticism from Congress on grounds that it would discipline Canada and the United Kingdom and insure against European Community (EC) restrictions on U.S. exports. (The EC was developing its own antidumping regulations at the time.) When the administration realized that Congress would not legislate the changes required by the code, it insisted that the executive branch had the power to implement these changes by modifying investigation and enforcement procedures. The Congress disagreed.

The resulting scrimmage between the administration and the Congress was one of many through which the Congress reasserted its control over U.S. trade policy. Antidumping, countervailing duties, and safeguards -- the major trade remedies -- were often the focus of these scrimmages. Broadening and strengthening these trade remedies was, to the Congress, much more than a means to retake control of trade policy from the president. It was also an
important congressional objective on its own. Adding this or that technical amendment -- tailor-made to fit the situation of a particular and powerful constituent -- soon became another vehicle for constituent service, the lifeblood of congressional politics.

Amendment by amendment, antidumping and the other trade remedies became the monsters that the early negotiators feared they might become. Along with the upgrading of the trade remedies came a partly consequent and partly independent downgrading of the trade negotiations so that, by the mid-1980s, the mechanisms for restricting trade had come to overshadow the trade negotiations as the major expression of U.S. trade policy. Antidumping and countervailing duty regulations were the vanguard of this 1980s revolution in U.S. trade policy.

The reasons antidumping emerged as a major policy instrument in the EC were not all that different from those in the United States. Slower growth made European governments sensitive to displacement of domestic production by emerging Asian exporters. The EC antidumping mechanism -- essentially the GATT Tokyo Round antidumping code translated into operational language (see Eymann-Schuknecht, PRE Working Paper, forthcoming) -- proved a doubly convenient means for responding. As economics, it was flexible enough to cover all problems. As politics, it was a community instrument. The EC Commission, with the instinct of any organization for demonstrating its usefulness and thereby expanding its turf, pressed forward with antidumping action to preempt member state governments from serving industries' increased demand for protection. And those who might have opposed either the illiberality of such actions or the shift of regulatory practice to Brussels were slow to see through the camouflage of propriety that cloaks antidumping actions.

The growth of unfair trade regulation in national policies is taken up elsewhere, for example, Finger and Messerlin (1989) and Low (1991). In this paper I want to provide an overall sense of how the expansion of antidumping came about. That story is, in essence, the cumulation of many small changes. Each of these small changes was made because antidumping, if expanded in a
particular way, could fix a pressing political problem. The dominant question was always "How can antidumping be applied to this problem?" The question was never "Is this really a problem caused by dumping?".

In the end, "dumping" has no meaning other than the cumulation of circumstances in which the politics of the immediate problem had exploited the flexibility of the underlying structure to rationalize action against imports. "Dumping" became, in law as well as in practice, anything you could get the government to act against under the antidumping law.

Extension to pricing below full cost

Perhaps the most significant step in the expansion of antidumping into a weapon against all imports was its extension to imports not priced at full cost. This extension not only expanded the substantive scope of the instrument, it also brought its administrative focus in line with its political focus: keeping prices high enough to prevent injury to domestic companies. And, as did many expansions of substantive scope, this extension necessitated a significant increase in administrative discretion in implementing the standard. The extension to below-cost pricing also illustrates the role power politics has played, at both the national and the international level, in the emergence of antidumping as an all-purpose weapon against imports. Each of these effects is taken up in turn.

Substantive scope

Competitive pricing does not always cover full costs. When demand surges, sellers can collect a premium, but when the market is off, any order that pays enough to cover out-of-pocket (marginal) costs is welcome. As noted above, Canada, in amendments passed in 1921 and 1930, extended its antidumping regulations to cover sales below fully allocated costs plus a reasonable allowance for overhead and profit. Given the depressed markets of the 1930s, that meant that antidumping action could be taken against almost any import
shipment. The fact that nowhere in the world did the exporter get a better price than in Canada did not matter: antidumping could be used against what the Canadian government perceived to be a major economic problem -- generally low prices.

But business conditions do not have to be as severe as they were during the depression of the 1930s to activate the below-cost pricing provision. Gary Banks points out in his paper that the provision was the basis for the expansion of Australian antidumping in the 1980s and that the inquiry commissioned by the Australian government recommended repeal of the provision in order to bring antidumping under control.

**Power politics: national**

Action against below-cost imports came into U.S. antidumping practice through the back door. The 1921 U.S. law provided that if the administrator was unable to determine the exporter's home-market price (because there were no home-market sales, or for other reasons) and if he could not determine the exporter's price in a third market, then he could base an antidumping case on an estimate of the exporter's cost. But, as the U.S. Tariff Commission study of 1919 revealed, U.S. business was more anxious to have protection against below-cost sales than against dumping, narrowly defined. The U.S. Congress in the 1920s and 1930s was generous with tariff protection. So interests seeking protection did not press for extension of the scope of antidumping. But after the position of the United States in the world economy had changed and the U.S. tariff had been negotiated downward, pressure increased for antidumping action. This pressure eventually brought the administering agency to add below-cost imports to the circumstances under which antidumping action would be taken.

The antidumping administrators found the necessary legal cover in the U.S. law in the phrase "in the ordinary course of trade": "The foreign market value of imported merchandise ... shall be the price ... at which such or similar merchandise is sold ... in ... the home country ... in the ordinary
course of trade" (U.S. Code 1677b). (The same phrase is in GATT article VI). Sales below full cost, the U.S. administrator interpreted, were not made in the ordinary course of trade. Before data on foreign price could be used, the prices had to be compared with the exporter's cost, and prices below cost could be thrown out.

Action against import sales below full cost thus came into U.S. antidumping policy as a revision of administrative interpretation, not as a legislated change. When the administering agency (then the U.S. Treasury Department) first adopted this interpretation, it tried to limit application to instances that could not be explained as reductions of price to meet competition in a temporarily depressed market. But the agency had the bad judgment not to apply the below-cost standard when it was critical to an antidumping request from a company with a politically powerful friend. The friend was Senator Russell Long of Louisiana who, as chairman of the Senate Finance Committee, probably had more power over trade legislation than any other person in Congress. Pending at the time was the 1974 trade bill, whose main purpose was to authorize U.S. participation in the Tokyo Round of GATT negotiations. Senator Long included in the bill an amendment to the antidumping law to require that sales below cost be considered dumping.

Current U.S. administrative practice for implementing this amendment is that if 10 percent or more of observed foreign sales are below estimated cost, such sales are not included in the calculation of foreign market value. This means that in any investigation, up to 90 percent of the U.S. government's information on foreign price -- the 90 percent most favorable to the exporter's case -- may be thrown out.

Power politics: international

International sanction for antidumping action against imports priced below fully allocated costs came about in a similarly arbitrary way. The Tokyo Round antidumping code allows for "normal value" (the generic term in the GATT for home-market price) to be determined on some basis other than market price.
in the exporting country "when there are no sales of the like products in the ordinary course of trade ... or when ... such sales do not permit a proper comparison" (article II:4).

The code itself does not clarify whether sales below cost are covered by this expression. But in November 1978, before the code had reached the approval stage, Australia, Canada, the European Community, and the United States reached an understanding that it is appropriate to regard sales below costs as "not in the ordinary course of trade" and to exclude them from the determination of foreign market value. A document announcing this understanding was circulated in the manner in which negotiating proposals or comments on proposals were normally distributed (Koulen 1989, 366). Ever since, action against below-cost imports has been an integral part of antidumping policy in each of the parties to the understanding.

Administrative discretion

As the story of the expansion of antidumping to cover below-cost pricing shows, administrative discretion plays an important role not only in the enforcement of antidumping law but also in its expansion. In particular, three facets of administrative discretion were influential:

- Adjustments (inferences), not observations, are the major input into an antidumping investigation.
- The detail of administrative regulation provides complexity, but it does not provide precision.
- Complexity camouflages opportunity for abuse.

Each is examined in turn.

The importance of adjustments

Comparing home price with export price and then determining if any detected difference has caused injury to an industry in the importing country looks at first glance like a straightforward operation. But the operation's
simplicity disappears quickly under any kind of scrutiny. First of all, the GATT provides that the price of the exported good be compared with the price of a "like product" sold in the home market. The Korean electronics industry exports basic, no-frills TV sets, while its home-market sales are concentrated in expensive, top-of-the-line models, with wooden cabinets and all the bells and whistles that can be installed. The intent of the investigation process is to compare apples to apples not apples to pears, so the investigator must adjust for the different product characteristics to make the price of a fancy 27-inch set that retails in the neighborhood of $2,000 comparable to that of a 13-inch set in a metal cabinet that retails for $169.95.

Another complication is that, for a fair comparison, the two prices should be at the same level of trade, normally at the ex-factory level. Again, Korean TV's provide an example. Korean manufacturers built their export business by selling in large volumes to American and European retailers. Distribution, retailing, and advertising were "added" by Sears or K-Mart. But in Korea, the manufacturing companies are parts of industrial conglomerates. These conglomerates own wholesale companies and department stores, which are the major retail outlets. Thus in Korea, the first sale that is not an intracompany transfer is the final sale to the consumer. But on exports, the first such "arms-length" sale is from the factory to the distributor-retailer.

Suppose that the antidumping investigation established from import documents that Sears paid $100 for the sets it retails for $169.95. The dumping margins the U.S. government found in the Korean TV case were about 15 percent, indicating that the "comparable" price of the sets sold in Korea was $115. This means that the adjustments for different product characteristics and different ways of doing business in Korea and in the United States reduced the $2,000 retail price to a comparable ex-factory price of $115. In other words, these administrative adjustments provide 95 percent of the information on which the eventual finding is based.

Even when the case seems to be straightforward -- identical products sold in the home and export market, at the same level of trade -- modern
antidumping practice makes the comparison mostly a matter of adjustments. First, home-market sales below full cost will not be used, so all data on home-market sales will be screened against the investigator's estimate of the exporter's cost. Though the price of the specific product is something one can observe in the market, its cost often cannot be. The factory building, equipment such as power generating equipment, general overhead, and the like cannot be directly identified with any particular product, so their contribution to the cost of a particular product must be inferred, following accounting and other conventions. Determining full cost is then not a matter of observable fact but of choosing among alternative ways of inferring this or that element of cost and then of choosing how much to allow in each instance--what percentage markup for profit, overhead, selling costs, and so on. Gary Horlick (1989, 136), once a high official in antidumping administration, estimates that some 60 percent of U.S. cases involve sales below cost.

Second, usual practice is to compare home and export prices at the ex-factory level, but even when export and home sales are at the same level of trade, they are often not at the ex-factory level, particularly for branded goods. Sony sells compact disc players to an American sales company that it owns, Sony-USA, which in turn provides distribution, advertising, service, and so on. To determine Sony's ex-factory "price," these expenses should be deducted from the price at which Sony-USA sells to an American wholesaler or retailer. Similar expenses should be deducted from Sony's sales to wholesalers or retailers in Japan.

Detail brings complexity, not precision

The increased scope of antidumping has brought with it a commensurate increase of administrative detail, but detail does not imply precision. William Carmichael (1986), drawing on twelve years of experience as head of the staff of the Australian Industries Assistance Commission, concluded that "the procedures to be followed in antidumping investigations are not amenable to precise and consistent application. This means that the task of
administering the legislation is not simply a task of following a set of unambiguous rules" (2). Carmichael gives as an example the determination of which good sold in the home market is "like" the good sold for export. That determination involves judgment and discretion about which technical rules to apply and demands expertise in the application of the selected technical procedures.

Similar mixes of judgment and skill are required in many other parts of both pricing and injury determinations. Gary Banks (PRE Working Paper Series No. 551), reports several examples that Carmichael provided. To mention only one of them, the cherries-in-brine case, the outcome of the case was significantly influenced by the administrative decision to combine the four grades of cherries commercially recognized in the exporting country into only three data categories for the investigation. The outcome of the case was also significantly affected by the way the investigating agency chose to value the containers in which the cherries were shipped.

The Swedish stainless steel case (PRE Working Paper Series, forthcoming) illustrates how many adjustments might be made in an individual case. In its request for information on which to base its assessment of the exporter's antidumping liability, the U.S. Commerce Department requested computerized data on over 50,000 individual transactions and thirty-eight fields of data for each transaction. Each of the thirty-eight dimensions was requested because it was to be the basis for an adjustment.

Given the number of adjustments that are made and the number of ways each of them might be made, the transparency of the adjustment process is like the transparency of a crystal chandelier rather than that of a windowpane. An expert will be able to predict how a ray of light will pass through any prism or plate in the chandelier. But it will be impossible to predict how each prism and plate will be turned at any moment, and hence how a ray of light will pass through the complexity of the whole.
Complexity provides cover for abuse

A considerable level of expertise is needed even to see which technical alternatives exist, much less to exploit them. The general public and the news media do not possess this expertise: the result is an environment made to order for special-interest power politics. Extension to cover pricing below full cost illustrates the sequence of events: first, pressure is applied to push administrative interpretation to the limit of existing law, then the extended interpretation is added to the law. Each time through, the law becomes more detailed and its administration more complex — a medium more and more hospitable to power politics, more and more favorable to the home country petitioner's case over the exporter's, and more and more detached from the initial rationale for the regulation.

Examples of skewed procedures

Many writers have documented specific examples in changes of law or administrative practice that have worked in the petitioner's favor; Bierwagen (1990) provides an excellent tabulation. I provide only a few examples here.

Treatment of selling costs

As mentioned above, manufacturing companies often sell or transfer goods to a subsidiary sales company (Sony to Sony-USA) so that the first arms-length transaction occurs when the sales company sells the product. To adjust costs to an ex-factory basis, the expenses of the sales company must be deducted. The following quotation relates specifically to European Community practice, but other countries treat selling costs the same way:

A producer which sells a consumer branded product at exactly the same price in both domestic and export markets, a situation which to anyone outside an antidumping administration would appear to be a typical case of no dumping, will systematically be credited with a dumping margin corresponding to the indirect selling

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expenses of his domestic sales organization for which no allowances can be made.... Indirect selling expenses for consumer branded products are substantial, often in the order of 15 to 20 percent of the selling price (Bellis 1989, 83).

**Averaging of home-market price**

Another example of how administrative practice finds dumping where anyone outside an antidumping investigation would find none concerns the way that the timing of export and home-market sales is treated. An investigation typically covers six months, over which many sales will be made, often at different prices. Suppose the exporter’s sales were as follows:

<table>
<thead>
<tr>
<th>Month</th>
<th>Export sale</th>
<th>Home-market sale</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>$150</td>
<td>$150</td>
</tr>
<tr>
<td>2</td>
<td>$50</td>
<td>$50</td>
</tr>
<tr>
<td>3</td>
<td></td>
<td>$100</td>
</tr>
<tr>
<td>4</td>
<td></td>
<td>$50</td>
</tr>
<tr>
<td>5</td>
<td></td>
<td>$100</td>
</tr>
<tr>
<td>6</td>
<td></td>
<td>$100</td>
</tr>
</tbody>
</table>

Volume of each sale = 100 units

Usual practice is to calculate a weighted-average home-market price for the period of the investigation and then to compare each export sale with that average.\(^4\) In the example, the average home-market price is $100 -- the weights (volumes) are equal. The average export price is also $100, but that is not the way an antidumping investigation is conducted. Instead, the price of each export sale will be compared with the average home-market price. Thus the export shipment of month 2 is not dumped: its price, $150, is above the average home-market price. Likewise, the export shipment of month 6, priced at $100, is not dumped. But the export shipment of month 4 carries a price $50 below the average home-market price and would be considered a dumped shipment.

The procedure would recognize that not all export shipments in the investigation period had been dumped, so it would move on to determine whether the amount of dumping was significant enough to warrant an affirmative finding. The rule of thumb here is the rule of 100: if the percentage of exports that are dumped multiplied by the percentage margin of dumping is 100
or greater, an affirmative determination will usually be returned -- 10 percent times 10 percent is sufficient. And the dumping margin in this case would be 50 percent, not 50 percent discounted by the share of exports judged to be dumped.

A warning about these examples: modern readers have a tendency to fix on the intricacy of these technical tricks and thus to forget the lesson of the first section of this paper: antidumping is, at its very core, a technical trick. The customs valuation tricksters who started the whole thing in 1904 would be proud of the resourcefulness of the new generation, but perhaps jealous of the air of respectability conferred by the cloak of national and international legality.

The end result

For the statement of my conclusion, I will borrow from other analysts. N. David Palmater (1991), referring specifically to U.S. practice, describes the situation as follows:

The standards of the day, the procedures it utilizes and the implementation of these standards and procedures by the Department of Commerce increasingly insure that, at the end of the day, an exporter determined to have been selling in the United States below "fair" value probably has been doing no such thing in any meaningful sense of the word "fair." To the contrary, rather than being a price discriminator, a "dumper" more likely is the victim of an antidumping process that has become a legal and an administrative non-tariff barrier. (3)

The European Community uses different procedures, but the end result is the same. As Angelika Eymann and Ludger Schuknecht (PRE Working Paper Series, forthcoming) point out the United States applies protectionist rules, the European Community applies protectionist discretion. The result in both cases is protection. In Brian Hindley's (1988b) words: "From antidumping law, the
Commission and the Council have fashioned a trade-policy weapon of great power. No legal process, either domestic or international, seems likely to place any substantial impediment in the way of the further development and deployment of that weapon" (460).

Gary Banks (PRE WPS 551), documents that Australian antidumping expanded so rapidly in the early 1980s that for several years Australia led the world in number of antidumping cases.

An internationalist might hope that internationalization would promote restraint but the internationalization of antidumping, through the GATT code and periodic meetings of antidumping enforcers, has served instead as a clearinghouse for each nation's new extensions, even as a counterforce to national attempts at restraint. Mark Dutz (PRE Working Paper Series, forthcoming), identifies as arguments used against antidumping reform in Canada not only the compatibility of Canadian practice with international norms, but also the need to maintain bargaining chips for possible international negotiations. Similarly, in Australia, although a government-commissioned study preparatory to the 1986 reform of antidumping identified the below-cost pricing clause in Australian law as the basis of the explosion of antidumping cases, Australian industry prevented repeal of the clause. Industry even extracted from the government a commitment -- with specific reference to the below-cost pricing clause and its use in Canada, the United States and the EC -- that "the Government was not less prepared to provide Australian industry with a lesser safeguard against unfair competition than provided by these other countries" (Button 1986, 2).

Descriptions of worlds like the world of antidumping are more often encountered in fiction -- weird fiction -- than in academic discourse. Note in the following passage by Douglas Adams (1980) the relationship between The Hitchhiker's Guide to the Galaxy and the galaxy. The relationship between antidumping law and dumping is the same.

The Hitchhiker's Guide to the Galaxy is an indispensable companion to all those who are keen to make sense of life in an infinitely
complex and confusing Universe, for though it cannot hope to be useful or informative on all matters, it does at least make the reassuring claim, that where it is inaccurate it is at least definitively inaccurate. In cases of major discrepancy it's always reality that's got it wrong.

This was the gist of the notice. It said "The Guide is definitive. Reality is frequently inaccurate."

This has led to some interesting consequences. For instance, when the editors of the Guide were sued by the families of those who had died as a result of taking the entry on the planet Traal literally (it said "Ravenous Bugblatter Beasts often make a very good meal for visiting tourists' instead of "Ravenous Bugblatter Beasts often make a very good meal of visiting tourists"), they claimed that the first version of the sentence was the more aesthetically pleasing, summoned a qualified poet to testify under oath that beauty was truth, truth beauty and hoped thereby to prove that the guilty party in this case was Life itself for failing to be either beautiful or true. The judges concurred, and in a moving speech held that Life itself was in contempt of court, and duly confiscated it from all those there present (38-39).

The "new" conception of antidumping

In part in response to criticism that dumping margins were frequently overstated by contemporary procedures, defenders of antidumping have pointed to what in EC practice is called the "lesser duty rule." The idea behind the rule is expressed in the GATT antidumping code (article VIII, paragraph 1): "It is desirable that the ... [antidumping] duty be less than the margin, if such lesser duty would be adequate to remove the injury to the domestic industry."
EC Commissioner for External Relations Willy de Clercq (1988), in defending EC antidumping policy as "incontestably by far the most liberal" (29, his emphasis), pointed out that "unlike U.S. authorities, the commission is not obliged to apply antidumping measures at rates which reflect the full margins of dumping established. On the contrary, under Community law the rate is restricted to that necessary to remove the injury caused" (29). Jean-François Bellis (1989), a prominent Brussels lawyer and legal scholar -- and sometimes critic of EC policy -- is an outspoken advocate of the lesser duty rule:

The EEC justifiably prides itself on the fact that, unlike the US, it applies the "lesser duty rule," i.e., it limits antidumping duties to the level necessary to eliminate the injury. This practice should be multilateralized in GATT in the form of a binding obligation. (94)\textsuperscript{16}

As to how to do it, Bellis explains:\textsuperscript{17}

In practice, the level of the duty is mainly determined by the level of price undercutting ... or by the level of resale prices that would be required to cover the costs of Community producers and provide a reasonable profit. (84-85)

Compare the statement above with this one:

In any protective legislation the true principle of protection is best maintained by the imposition of such duties as will equal the difference between the cost of production at home and abroad, together with a reasonable profit to American industries. (quoted in Taussig 1931, 363)

The second of these is the 1908 U.S. Republican party platform statement of the cost-equalization formula: the formula that the U.S. Congress followed in writing the Smoot-Hawley Tariff.
As to the usefulness of the formula as a guide to policy, E.E. Schattschneider (1935) is emphatic in arguing that it has no operational meaning:

Talk of tariffs written on the cost formula is no more than an elaborate sham and a bluff.... The committees did not generally determine rates according to the formula advertised, and they did not do so for the conclusive reason that they could not. (84)

The difference of cost formula is to be classified more properly as a slogan belonging to the politics of gaining acceptance of [protection] than as a method of determining rates. (284)

Frank Taussig (1931) is equally critical of the lack of substance of the principle, but less scathing. He points out that anything can be made within any country if the producer is assured a price high enough to cover all cost of production together with a reasonable allowance for profits. "Yet," he adds, "little acumen is needed to see that, carried out consistently, it means simple prohibition and complete stoppage of foreign trade" (633).

Perhaps it is overkill to recall the wisdom of E.E. Schattschneider and Frank Taussig to argue that contemporary antidumping is out of control. It should be sufficient to point out that its own defenders bring forward the economic philosophy of the Smoot-Hawley Tariff as its rationale.

Section 3: Summing up the Paper

The cause that justifies an action is often far removed from the motives that propel its advocates. When push comes to shove, it is the motives, not the cause, that dictate what the details of the action will be. And the details, in turn, dictate what the substance will be.

Antidumping is not public policy, it is private policy. It is a harnessing of state power to serve a private interest: a means by which one competitor can use the power of the state to gain an edge over another competitor. Antidumping regulation was created by removing from antitrust law
the checks and balances that constrain antitrust policy to disciplining only competitive practices that compromise society's overall interests. Antitrust is in both theory and practice an instrument to defend the public interest. But antidumping is a different matter. Free of the constraints that rule of law impose on antitrust, antidumping is an instrument that one competitor can use against another -- like advertising, product development, or price discounting. The only constraint is that the beneficiary interest must be a domestic one and the apparent victim a foreign one.

Antidumping is the fox put in charge of the henhouse: trade restrictions certified by GATT. The fox is clever enough not only to eat the hens, but also to convince the farmer that that is the way things ought to be. Antidumping is ordinary protection with a grand public relations program.

One last point. The history of antidumping suggests that we pay tribute to the durability of an idea. The notion that underlies contemporary antidumping -- that protection should bring the price of imports up to a level that would cover all local production costs plus a reasonable allowance for profit -- seems to be one for the ages. It inspired Canada's pioneering development of antidumping and the U.S. Congress's writing of the Smoot-Hawley Tariff, and it is the potential foundation for Fortress Europe.
Table 26: Results of the 1919 U.S. Tariff Commission survey to detect dumping and unfair foreign competition

<table>
<thead>
<tr>
<th>Item</th>
<th>Number of responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enterprises surveyed directly</td>
<td>562</td>
</tr>
<tr>
<td>Responses received</td>
<td>281</td>
</tr>
<tr>
<td>Reported foreign practices</td>
<td></td>
</tr>
<tr>
<td>No unfair foreign competition or dumping</td>
<td>135</td>
</tr>
<tr>
<td>Foreign competition</td>
<td>146</td>
</tr>
<tr>
<td>Dumping</td>
<td>23</td>
</tr>
<tr>
<td>Severe competition</td>
<td>97</td>
</tr>
<tr>
<td>Threats</td>
<td>1</td>
</tr>
<tr>
<td>Trademark violations</td>
<td>5</td>
</tr>
<tr>
<td>Patent violations</td>
<td>1</td>
</tr>
<tr>
<td>Counterfeiting of articles</td>
<td>7</td>
</tr>
<tr>
<td>Deceptive labeling</td>
<td>4</td>
</tr>
<tr>
<td>Undervaluation to avoid customs duties</td>
<td>8</td>
</tr>
</tbody>
</table>

Source: U.S. Tariff Commission (1919, 12, 13).
<table>
<thead>
<tr>
<th>Act and date</th>
<th>Major elements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sherman Act, 1890</td>
<td>• Conspiracy or combination</td>
</tr>
<tr>
<td></td>
<td>• Restraint, monopolization, or attempt to monopolize interstate or foreign commerce</td>
</tr>
<tr>
<td></td>
<td>• Criminal statute, strictly construed</td>
</tr>
<tr>
<td></td>
<td>• Fine, imprisonment; triple damages</td>
</tr>
<tr>
<td>Section 73, Wilson Tariff Act, 1894</td>
<td>• Conspiracy or combination engaged in importing</td>
</tr>
<tr>
<td></td>
<td>• Intent to restrain trade, increase the price in the United States</td>
</tr>
<tr>
<td></td>
<td>• Criminal statute, strictly construed</td>
</tr>
<tr>
<td></td>
<td>• Fine, imprisonment; triple damages</td>
</tr>
<tr>
<td>Antidumping Act, 1916</td>
<td>• Importing below actual market value</td>
</tr>
<tr>
<td></td>
<td>• Intent to injure a U.S. industry</td>
</tr>
<tr>
<td></td>
<td>• Criminal statute, strictly construed</td>
</tr>
<tr>
<td></td>
<td>• Fine, imprisonment; triple damages</td>
</tr>
<tr>
<td>Antidumping Act, 1921</td>
<td>• Importing below fair value</td>
</tr>
<tr>
<td></td>
<td>• Injury to a U.S. industry</td>
</tr>
<tr>
<td></td>
<td>• Administrative determination by the secretary of the treasury</td>
</tr>
<tr>
<td></td>
<td>• Special duty, equal to the difference between the fair value and the import price</td>
</tr>
<tr>
<td>Section 316, Fordney-McCumber Tariff Act, 1922</td>
<td>• Unfair method of competition and unfair acts in importation</td>
</tr>
<tr>
<td></td>
<td>• Effect or tendency is to destroy or substantially injure</td>
</tr>
<tr>
<td></td>
<td>• Tariff commission, with court review of questions of law only</td>
</tr>
<tr>
<td></td>
<td>• Additional duty to offset such act or method</td>
</tr>
</tbody>
</table>

Sources: Dale (1980, chapter 1); Viner (1923, chapter 13); US Tariff Commission (1919, appendix).
Notes

1. The Country party practiced similar politics in Australia in the middle of the twentieth century. See, for one discussion, Rattigan (1986).

2. The best known study of the log-rolling dynamic of tariff-making is Schattschneider's (1935) study of the U.S. tariff. Schattschneider concluded:

   It must be said at the outset that the protective tariff has been transformed in the process of making it politically strong. American tariff history is the account of an unsuccessful attempt to set up a beneficently discriminatory set of privileges, resulting in legislation so indiscriminately broad as to destroy the logic and sense of the policy. (283)

   Rattigan (1986, 11) notes a similar situation in Australia.

3. The result brings to mind Frank Taussig’s explanation of pricing strategy of a firm so situated: "The monopolist sells at high prices where he can, and accepts lower prices where he must" (Taussig and White 1931, 208). Taussig’s quip reminds one to ask if it was Canada or U.S. Steel or UK exporters that came out ahead from this.

4. The United Kingdom tariff was still low.

5. The law provided that action would be taken when the minister of customs was satisfied that the export price was below the fair market value of the good. While the Customs Act provided instructions on how fair market value should be calculated, it provided no definition of "export price," and no recourse other than political entreaty to anyone who thought that the minister was overlooking an instance of dumping.

6. Viner then comments: "These accusations have an interesting parallel in the similar charges brought against England after the Napoleonic Wars and the War of 1812, but they appear to have had even less basis" (65).

7. An interesting side note is that the increase in productivity did not come as a surprise to John D. Rockefeller, the architect of the Standard Oil trust. Though his friends had advised him to sell his shares of the six separate companies into which Standard Oil shares had been divided, he anticipated that they would increase in value and he held on. He was right. In less than a year the shares of Standard Oil of Indiana had tripled in value, those of the other five companies had doubled. For Mr. Rockefeller, this meant an increase in his personal worth of $900 million, or $9 billion at the 1991 price level (Yergen 1991).

8. A methodological note: some things are not additive. A gap of forty feet cannot be cleared in four jumps of ten feet each. The question is not how the changes of U.S. law added together, but which one really made the difference.

9. In this regard, the wording of the 1916 and the 1921 acts differed very little. The two were, however, interpreted very differently, a point I take up in the section on standards of proof.
10. Including the word "intent" in the injury clause of the 1921 antidumping act would have made little difference in how it was interpreted. Anyone who offers goods for sale does so with the intent of winning the sale from someone else. So, in an administrative context, free from the precedents of the legal system, it is unlikely that the word "intent" would have limited when injury would be found.

11. Palmeter (1991) explains that the logic behind the "best information available" provision is that without it the respondent could block an investigation by refusing to cooperate. He points out that the provision was rarely used until recently. But in recent cases information requirements put to respondents have been so difficult that they were either unable to comply or estimated that complying to be so costly that they chose not to.

12. Wilson, near the end of his last term, had vetoed the same bill that, when passed again by the next Congress, became the antidumping law of 1921.

13. At the end of December 1989, a comparable tally, covering only Australia, Canada, the United States, and the European Community, came to 530 (Low 1991, 22).


15. Each industry study author, in his first draft, made a major point of how unreasonable was the interpretation that applied antidumping to that industry's exports. The point receives less emphasis in the final versions because the authors and I have agreed that the overall lesson is not that each application is an aberration from the norm, but that there is no norm. Thus, for example, the Swedish stainless steel case is not a misapplication of antidumping rules; antidumping rules are a misapplication of economic policy and of legal principles of even-handedness and due process.

16. Bellis is, however, critical of the way the EC has put the rule into practice.

17. The description given by the Antidumping Authority (1990, 6-7) indicates that Australian practice for determining the noninjurious price level is similar. Enforcement practices seem, however, to be quite different. In essence, an Australian antidumping order posts the noninjurious import price: exporters can avoid paying any duty by pricing at or above that level. Under EC enforcement practice (as described by Norall 1986, 108) the exporter would have to raise its price to the no dumping level, rather than to the no-injury level, to avoid the duty.
References


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